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15th Floor
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Philadelphia, Pennsylvania 19107
(215) KI6-3232

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 197__

NO. 78-1832

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

JULIUS T. CUYLER, Superintendent

and

DISTRICT ATTORNEY OF PHILADELPHIA, Petitioner

V.

JOHN SULLIVAN, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The motion of John Sullivan, respondent, by his attorney Marilyn J. Gelb, Esquire, respectfully represents:

1. That he is the respondent in the above-captioned case.

2. That petitioners in the above-captioned case have filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, which Court reversed the order of the United States District Court for the Eastern District of Pennsylvania, and issued a Writ of Habeas Corpus discharging respondent from state custody by order of February 14, 1979.

/.

3. That respondent was granted leave to proceed in forma pauperis by order of Davis, J., of the United States District Court for the Eastern District of Pennsylvania on July 25, 1977.

4. That respondent was released from state custody on May 24, 1979, having been continuously in custody since his arrest on homicide charges on November 3, 1966.

5. That respondent is the owner as tenant by entireties of premises 751 Michell Street, Ridley Park, Pennsylvania, which realty is the home his wife and minor child presently occupy and which he is reliably informed is encumbered by a first mortgage held by the Industrial Valley Bank with a principal sum in excess of $10,000.00.

6. That he has no bank accounts and no other assets; that he has no income other than social security disability benefits due to his ill health; that he is unable to work and has no money to proceed with the Answer to the Petition for Writ of Certiorari.

WHEREFORE, respondent prays the Court to permit him to file the Answer to the Petition for Writ of Certiorari without paying fees or costs.

Respectfully submitted,

Marilyn J. Gelb, Esquire
Attorney for the Respondent.

2.

Forma Pauperis Affidavit

COMMONWEALTH OF PENNSYLVANIA:
SS
COUNTY OF PHILADELPHIA :

JOHN SULLIVAN, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

John Sullivan

Sworn to and Subscribed
Before Me This 27th Day
of July, 1979.

Margaret H. Burns
Notary Public

My Commission Expires:

MARGARET H. BURNS
Notary Public, Phila., Phila. Co.
My Commission Expires March 3, 1983

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JOHN SULLIVAN, Respondent

RESPONDENT'S ANSWER TO PETITIONERS'
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Marilyn J. Gelb, Esquire
Attorney for Respondent
15th Floor
1314 Chestnut Street
Philadelphia, PA 19107
(215) KI6-3232

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IN THE

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JULIUS T. CUYLER, Superintendent

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DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner

V.

JOHN SULLIVAN, Respondent

RESPONDENT'S ANSWER TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The respondent, John Sullivan, respectfully prays that a Writ of Certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 14, 1979.

OPINIONS BELOW

The Opinions below are reproduced in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTIONS PRESENTED

1. Should certiorari be granted if the Circuits adhere to a differing standard of review of Sixth Amendment claims in a case where the underlying facts supporting a Sixth Amendment violation compel the same result reached by the Court below under any standard of review?

2. Should the petition be granted as to an alleged absence of state action, where such allegation is raised for the first time in the petition, and where in any event the record demonstrates state action for Fourteenth Amendment purposes?

3. Should the petition be granted on the basis of an allegation of abuse by the Third Circuit of state fact finding process, where the Third Circuit decided no facts but reached conclusions of law based upon facts developed in the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Petitions.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On the evening of June 17, 1966, John Gorey, a minor labor union official, and Rita Janda, his companion, were shot to death in Gorey's office at the Philadelphia headquarters of Teamsters Local 107. Respondent, John Sullivan, was arrested and indicted for the murders, as were two others, Gregory Carchidi and Anthony DiPasquale.

Two attorneys, G. Fred DiBona and A. Charles Peruto, entered appearances on behalf of each of the three defendants. Respondent, in June, 1967, came to trial first. The defense rested without putting on any evidence. The jury convicted the respondent and sentenced him to life imprisonment. Carchidi was later acquitted of the same charges in a separate trial on January 26, 1978, as was DiPasquale on March 14, 1968.

Respondent's post trial motions in July 1968 were denied by a three judge panel of the Court of Common Pleas, with one judge voting to grant a new trial. After sentence of two consecutive life sentences was imposed, respondent filed a direct appeal to the Pennsylvania Supreme Court. He also filed an application in the trial court for a writ of error coram nobis, which was denied. Asserting Sixth Amendment claims including ineffective assistance of counsel in failing to brief his appeals, respondent petitioned pro se for habeas corpus relief in federal court. The petitions were dismissed on September 17 and December 31, 1969, and on November 26, 1969 the docket of the Pennsylvania Supreme Court reflected the claim that no briefs were ever filed on his behalf in the Pennsylvania Supreme Court. The essence of respondent's collateral attack of his conviction in federal court was later raised in state court post conviction proceedings.

On December 29, 1971, an equally divided Pennsylvania Supreme Court affirmed Sullivan's convictions, with three justices voting to discharge Sullivan because the evidence was insufficient to support the verdicts. Commonwealth v. Sullivan, 446 Pa. 419, 286 A.2d 898 (1971). Respondent, through new counsel who continues to represent him, has twice been denied reconsideration of the Supreme Court decision. Commonwealth v. Sullivan, 472 Pa. 129, 180, 371 A.2d 468, 492 (1977).

Respondent then collaterally attacked his conviction in the Pennsylvania courts. On October 30, 1973, a petition for post conviction relief under the Pennsylvania Post-Conviction Hearing Act (PCHA), 19 P.S. §1180.1 et.seq., was filed. This resulted in five days of evidentiary hearings. Sullivan, Carchidi, Peruto, DiBona, the trial judge and others testified. On November 6, 1974, the PCHA court ruled that respondent had been denied effective assistance of counsel on appeal and permitted him to file a second direct appeal to the Pennsylvania Supreme Court.

Sullivan filed his second appeal nunc pro tunc and also appealed from the denial of post conviction relief on other grounds. The Commonwealth cross-appealed the decision to permit a second direct appeal to be filed. All three appeals were consolidated and argued on January 16, 1975. On February 28, 1977, the Supreme Court affirmed the original conviction and the denial of post-conviction relief. Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468 (1977), with a factual finding of ineffective assistance of counsel on appeal.

Respondent then filed for habeas corpus in the United States District Court for the Eastern District of Pennsylvania. The petition was referred for report and recommendation to a United States Magistrate, who found that Sixth Amendment grounds for relief existed and recommended that the writ issue.

. The district judge denied the petition. Respondent appealed the order to the United States Court of Appeals for the Third Circuit, which reversed the district court and issued the writ on the grounds that respondent's Sixth Amendment rights had been violated by a conflict of interest arising out of the dual representation, by Peruto and DiBona, of respondent and his co-defendants.

FACTUAL HISTORY

At trial the Commonwealth adduced the following evidence in support of charges against John Sullivan:

Francis McGrath, then employed as a janitor by Local 107, Teamsters Union, arrived at Union Headquarters at 105 Spring Garden Street in Philadelphia at approximately 5:15 P.M. on June 17, 1966. He drove into the parking lot and parked his car. He observed other cars parked on the lot, one being John Sullivan's and another being John Rispo's. (N.T. trial, 677-678) He testified he saw and spoke to John Sullivan, who was at that time a delinquent accounts

collector for the Union. Sullivan had been talking on the telephone, and when he hung up, he asked the janitor what he was doing there. McGrath explained that he had not come in on Thursday, the day before, although Thursday was his normal cleaning day, (N.T. trial, 677) and that there had been complaints about his cleaning He therefore decided to come in on this day, Friday, instead. McGrath said he and Sullivan together observed John Gorey and Rita Janda arrive in the parking lot, and shortly afterward McGrath and Gorey had a conversation out of the presence of Sullivan during which time Gorey told McGrath that there were complaints made to the effect that the janitor had not been keeping the building clean. (N.T. trial 832). McGrath said Gorey then left and Sullivan then came into the room which he (McGrath) was cleaning, and suggested that he let the cleaning go until after the meeting took place on Sunday. McGrath then talked to Sullivan about his conversation with Gorey. While they were talking, Gregory Carchidi, also a janitor for the Union, entered.

(N.T. trial 692). McGrath then brought up the subject of the cleaning and told Carchidi what Gorey had relayed to him. Carchidi made a similar suggestion to let the cleaning go until after the meeting on Sunday. Sullivan had already left the room when this portion of the conversation took place. (N.T. trial 693, 836). McGrath said that he then heard loud noises like firecrackers. Carchidi, according to McGrath's testimony, said "Get out of the building and don't say nothing." whereupon McGrath did exactly that. McGrath testified that there were at least six ways of getting upstairs to the second floor from the ground floor of the building. (N.T. trial, 592).

On his way out, McGrath stopped to have a conversation with one Nicholas Franks who was standing on the sidewalk near Gorey's second floor office. (N.T. trial 697, 849). Others were standing nearby also. McGrath said Sullivan's car and Rispo's were still on the parking lot, and this time he observed Carchidi's car as well. The janitor said he returned later and found that all the offices had been

locked, the lights turned off, and the building deserted. He thereupon removed evidence indicating that he had been in the building, and without checking any of the rooms in the building, he left for the second time that evening. The bodies of Gorey and Janda were found the next morning in Gorey's second floor office. No eyewitness evidence nor physical evidence of any nature was ever found linking Sullivan to the murders. Nothing found on his person or among his effects supplied any inference that he had ever been in John Gorey's office. No murder weapons were ever discovered, and no scientific evidence of any nature was found which would tend to prove circumstantially that Sullivan committed the crime. On November 3, 1966 Sullivan and Carchidi as well as Anthony DiPasquale were arrested and charged with these crimes. Carchidi and DiPasquale were both acquitted subsequent to Sullivan's convictions as herein detailed.

REASONS FOR DENYING THE PETITION

I. Even if Disagreement exists among the circuits in determining the standard for review in cases of conflicts of interest for Sixth Amendment purposes, the instant case is not emblematic of that disagreement and therefore presents no issue warranting this Court's attention.

Notwithstanding petitioners' assertion (petitioners' brief p. 13), the standard for determining conflicts of interest in the Sixth Amendment context utilized by the Third Circuit is not unique. To the contrary, that standard is in fundamental agreement with six other circuits. Additionally, the law of the Commonwealth of Pennsylvania, under which the respondent was tried, reflects the standard utilized in the Third Circuit. Finally there can be no question that the result reached by the Third Circuit would be unaffected by application of the strictest existing standard. The conclusion that

respondent was denied effective assistance of counsel at his trial is amply supported by evidence of an actual conflict of interest by which respondent was prejudiced.

The cases cited by petitioners to support the proposition that only the Third Circuit, the District of Columbia Circuit, and possibly the Eighth Circuit require minimal proof of a conflict of interest in order to find a Sixth Amendment violation do not support that proposition. The majority rule in the circuit courts requires that an actual conflict and/or prejudice in fact need only be shown where a valid waiver of the right to be singly represented occurred at trial level. The bulk of cases cited by petitioners are, upon close scrutiny, cases in which the circuit courts have attempted to define the components of an effective waiver, without reaching the merits of the underlying Sixth Amendment claim. It is in the standard for determining a waiver of the right to be

singly represented that the circuit courts diverge, and not in determining what constitutes a conflict of interest in the absence of such a waiver. See, e.g., United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (trial judge under duty to inquire into joint representation; where such inquiry is not of record, government has burden of showing unlikelihood of prejudice by a preponderance of the evidence); Kaplan v. Bombard, 573 F.2d 708 (2nd Cir. 1978) (even if there is an effective waiver, court may find Sixth Amendment violation if actual prejudice is shown); United States v. Carrigan, 543 F.2d 1053 (2nd Cir. 1976) (actual conflict of interest prejudiced defendant despite an effective waiver); United States v. Atkinson, 565 F.2d 1283 (4th Cir. 1977), cert. denied, 98 S.Ct. 2845 (1978) (constructive waiver found by defendant's decision to continue with same counsel); United States v. Mandell, 525 F.2d 671 (7th Cir. 1975) (duty of effectuating

waiver for jointly represented defendants is upon the bar, rather than the court); Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973) (court under affirmative duty to inquire into joint representation; where no inquiry appears of record, waiver will not be presumed); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) (where no effective waiver, the burden is on government to show no conflict of interest beyond a reasonable doubt). In these cases, the difficulty has been in determining whether a Johnson v. Zerbst, 304 U.S. 458 (1938) type of waiver is required, or whether some lesser standard of waiver will make the consent to joint representation effective.

In the instant case, the question of the respondent waiving his right to be effectively represented by counsel who also represented his co-defendants has never been at issue. At no time was an inquiry conducted at trial level, directed toward advising

the respondent of the dangers and difficulties inherent in dual representation.

John Sullivan was represented by two attorneys who also represented his co-defendants. All three defendants, Sullivan, Carchidi, and DiPasquale were tried separately, so in that sense there was dual representation. Both within and outside of the courtroom, however, respondent was jointly represented with his co-defendants by the two attorneys who made decisions that affected all three. The strategies and conduct of Sullivan's defense were decided in group meetings where the co-defendants actively participated. Decisions not to put on a defense for Sullivan, decisions not to testify, were made in joint meetings of counsel and co-defendants. The interests of the co-defendants, who had yet to be tried, informed this decision-making process as much as the interests of the respondent himself.

Indeed, one of the attorneys, Mr. Peruto, testified at post conviction proceedings that the decision not to put on a defense was a decision not to expose the defense of his other two clients.

Respondent was never warned of the dangers inherent in such representation, and in no way agreed to forego his right to be effectively represented. The circuit court decisions cited by petitioners are therefore irrelevant. The Third Circuit standard for determining a conflict of interest "however remote"[2] is established in the absence of an effective waiver to a conflict of interest by the respondent. Under these circumstances, the standard applied is eminently reasonable. It is the identical standard which triggers the need for an on-record colloquy in the circuits which require such a colloquy at

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[2] Walker v. United States, 422 F.2d 374 at 375 (3rd Cir. 1969) cert. denied 399 U.S. 915 (1970).

trial level. In adopting the trial level colloquy/waiver of single representation, the First Circuit stated that the rule was designed "to accomplish ( ) an essentially similar result" as the reversal rule where such a colloquy does not occur. United States v. Foster, 469 F.2d 1, at 5 (1st Cir. 1972). See also United States v. Corrigan, 543 F.2d 1053 (2nd Cir. 1976) (potential conflict triggers the need for an on record waiver of single representation.)

Only four circuits require a showing of actual conflict of interest[1] in the absence of

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[2] Although the terms "actual conflict" and "actual prejudice" are often used synonymously in this line of decisions, the constitutionally mandated rule requires that when an actual conflict of interest is shown, no inquiry into the degree of prejudice need follow. See Holloway v. Arkansas, 435 U.S. 475 (1978). This much is conceded by petitioners (pet. brief p. 15).

an informed waiver of single representation. See, e.g., Haggard v. State of Alabama, 550 F.2d 1019 (5th Cir. 1977); Thacher v. Bordenkircher, 590 F.2d 640 (6th Cir. 1979); Watkins v. Wilson, 408 F.2d 351 (9th Cir. 1969); McHenry v. United States, 420 F.2d 927 (10th Cir. 1970). Respondent urges that the most burdensome of these standards could not alter the conclusion reached by the court below, that respondent was denied effective assistance of counsel who were burdened by a conflict of interest. The language of the decision below requiring only "the possibility of a conflict, however remote" tends to obscure the fact that respondent's two trial counsel, who also represented respondent's co-defendants, had, in fact, a conflict of interest.

The definition, in the Fifth Circuit, of a conflict of interest is articulated in Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975). That court defined a conflict of interest as that which is:

> "...present whenever one defendant stands to gain significantly

> by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing." Foxworth, at 1076.

The Court additionally noted:

> "It must be remembered that in cases involving conflicts of interest, the conflict does not always appear full blown on the record, since counsel throughout may endeavor to reconcile the conflict." Id., at 1080, citing

Austin v. Erickson, 477 F.2d 620 (8th Cir. 1972).

Both statements apply to John Sullivan. His trial attorneys orchestrated his defense in deference to the interests of his two co-defendants whom they also represented. Because the three defendants were tried separately, yet jointly represented otherwise, the conflict does not appear full blown on the trial record, but is amplified by the post conviction record.

Both co-defendants were subsequently acquitted of the charges, although respondent was convicted. The Pennsylvania Supreme Court split three to three on the issue of whether

there was evidence against Sullivan sufficient to support his conviction. Where the evidence was, as the lower court found, "scant", any doubt as to competency must be resolved in favor of the respondent. In such a close case the reluctance of trial counsel to put on a defense, including the calling of witnesses known to be nearby, and motivated by a concern for the other defendants, actually prejudiced the interests of John Sullivan.

Respondent contends, therefore, that under any current standard of review, his Sixth Amendment right to effective assistance of counsel was curtailed by an actual conflict of interest. The petition for certiorari presents no issue warranting the review of this Court.

II. Because the question of state action for Sixth and Fourteenth Amendment purposes appears for the first time in the petition for writ of certiorari, petitioners have waived their right to raise it here, and therefore no cognizable issue is presented to warrant review by this Court.

The petitioners argue (petitioners' brief pp. 20-29) that in the absence of an actual conflict of interest, there is no state action for a Sixth Amendment claim where a state prisoner was represented at trial by privately retained counsel. An allegation of absence of state action was never briefed or argued to the courts below. As a result, the petitioners have waived their right to raise the issue here. The allegation that no Sixth Amendment violation occurred because no state action was involved has not been preserved for review by this Court.

It has been established that this Court will not consider issues presented for the first time in a petition for writ of

certiorari. United States v. Ortiz, 422 U.S. 891 (1975), at 898. Nor will this Court decide an issue where it is unclear from the record that it was presented below. Ramsey v. United Mine Workers of America, 401 U.S. 302 (1971) at 312.

Even had the issue been presented in the court below, it could not have been decided adversely to the respondent, since the state court was at all times aware that Mr. Sullivan's attorneys also represented his two co-defendants. Both trial counsel entered appearances for all three defendants at the same time. One of the attorneys, Mr. DiBona, referred to Gregory Carchidi as his other client at the beginning of respondent's trial. Mr. Peruto, the other attorney, referred to DiPasquale as his other client (N.T. Trial, May 11, 1967, p. 3, at appendix 47C). That Mr. Sullivan was tried separately in no way abscured the fact that he was represented by two attorneys who also provided representation for his co-defendants.

In this context, the Third Circuit has held:

> "The action of the trial judge in permitting the case to go forward without so much as an inquiry as to potential harm ... is the state action complained of." Unites States ex rel. Hart v. Davenport, 478 F.2d 203 (3rd Cir. 1973) at 211.

In the second place, the distinction urged by petitioners between court appointed and privately retained counsel has been explicitly rejected by the Third Circuit:

> "A rule which would apply one Fourteenth Amendment test to assigned counsel and another to retained counsel would produce the anomaly that the non-indigent, who must retain an attorney if he can afford one, would be entitled to less protection from the trial court." Hart v. Davenport, supra, at 211.

The petitioners have foregone the right to raise this issue. Had it been raised, it would have resulted in a finding of state action.

Petitioners concede that a showing of actual conflict of interest disposes of the question of state action. Respondent asserts further that an actual conflict of interest existed, and that this is dispositive of the

entire matter.

At least one of Mr. Sullivan's two trial attorneys, Mr. Peruto refrained from putting on a defense because he did not want to expose the defense of the other two defendants, Carchidi and DiPasquale. The notes of testimony of the post conviction hearing bear out this view:

"Q. Wait just a minute, sir. You were concerned with the other two defendants you represented, is that correct?

A. (By Mr. Peruto) Yes. Why expose your defense if you have got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?

A. Sure it did." (N.T. post conviction, April 25, 1974, p. 101, appendix at 48C).

Even if only one of respondent's two trial attorneys perceived conflicted motives in himself for failing to put on a defense, that attorney also represented the other two defendants, and provided extensive representation for the respondent at his trial. As the Third Circuit opined:

"We believe that an attorney who enters an appearance on behalf of a criminal defendant, consults with him confidentially for the purpose of preparing a defense, investigates his case, aids in the pretrial preparation of his defense, appears at his trial, participates in the selection of the jury that is to decide his fate, argues motions and objections, confers with co-counsel on trial strategy, offers the defendant legal advice, including advice on whether he should testify or present evidence in his defense, and argues the issue of penalty, a matter of life and death, to the jury on the defendant's behalf must be said to represent that defendant and owe to him all the duties an attorney owes to a client in a criminal case." (Appendix, at 11B.)

Since the Third Circuit ruled as a matter of law that dual representation did exist, the issue of whether an actual conflict of interest attended upon this dual representation is easily resolved. Mr. Peruto's testimony at post conviction proceedings in 1975 is buttressed by the trial record in 1967. For example, a statement by Gregory Carchidi was entered into evidence at Mr. Sullivan's trial as the statement of a co conspirator.[1]

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[3] This statement was found admissible, on first review by the Pennsylvania Supreme Court, as res gestae, or excited utterance. Commonwealth v. Sullivan, 446 Pa. 419 (1971) at 439.

Since Mr. Peruto also represented Carchidi, he was placed in the position of deciding whether to call Carchidi to rebut the inference, or allowing the inference to remain uncontradicted. In choosing the former, Peruto would have been required to provide representation for Carchidi as to his Fifth Amendment privilege. Instead he chose Carchidi's right to remain silent at the expense of Sullivan's defense. At Sullivan's trial Mr. Peruto demonstrated the extent of the conflict:

"Peruto: You put me in this position; a statement by Carchidi offered into evidence and can only be refuted by Carchidi.

The Court: It is the law because a defendant refuses to testify he can't offer something.

Peruto: The defendant can testify, but how can he testify to what Carchidi said and you can't put Carchidi on the record." (N.T. trial, June 13, 1967, p. 672, appendix at 58C).

Mr. Peruto also failed to put exculpatory witnesses on the stand at respondent's trial to protect Carchidi and DiPasquale who,

Mr. Peruto said, may have been seen on the night of the crimes. He testified:

"Q. Did you advise the defendant Sullivan when you were considering whether or not to put on a defense that these three witnesses were available and could help this defense?

A. I don't recall advising him of that, but I do recall that I felt that it might be dangerous because one of the other two defendants leaving in a hurry might have been seen by those witnesses and it might have come out on the cross-examination of those witnesses in Sullivan's case." Appendix at 58C.

The state of the record indicates that Mr. Peruto's perceptions were correct. An actual conflict of interest was created by trial counsel's representation of respondent and his co-defendants.

In the presence of such a conflict, the allegation that dual representation by retained counsel presents no state action for review by a federal forum becomes irrelevant. Additionally state action, indicated by the knowledge of the trial court that Sullivan's attorneys also represented his co-defendants, is unquestionably present, regardless of whether an actual

conflict of interest has been shown. Finally, petitioners have waived their right to argue lack of state action in respondent's Sixth Amendment claim, by failing to raise it at any point below. Therefore, it is urged that no issue has been preserved requiring the review of this Court.

III. The court below decided two issues of law, relying upon facts found by the state courts, and therefore violated no principle of comity or of habeas corpus review which warrant the attention of this Court.

There were two issues of law before the Court: (1) was respondent dually represented at his trial by counsel who also represented his co-defendants, and (2) did this dual representation deny respondent effective assistance of counsel under the applicable standards for such a determination?

The court below answered both questions affirmatively. In so doing, the court utilized the record as it had been developed in the Pennsylvania state court system. Although

the court below disagreed with the findings of the Pennsylvania Supreme Court on the issue of dual representation, it held:

> "Properly speaking the Supreme Court's conclusion that there was no dual representation was not a finding of fact but a legal conclusion - the application of a legal standard to the facts developed on the record." United States ex.rel Sullivan v. Cuyler, 593 F.2d 512 (3rd Cir. 1979).

The court below relied on the facts in the record in reaching a different legal conclusion. This reliance was compelled by Townsend v. Sain, 372 U.S. 293 (1963) in which this Court held that in petitions for habeas corpus:

> "...Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court findings independently." Townsend v. Sain, supra, at 318.

The state court never reached the Sixth Amendment claim because it concluded there was no dual representation. Even if it had, the court below had no obligation to defer to the findings of fact of the state supreme court.

Moreover, even the state supreme court found incompetence of counsel for failure to protect respondent's appellate rights. Commonwealth v. Sullivan, supra, 472 Pa. at 145, appendix 17D. Additionally, the standard used by the court below to determine the Sixth Amendment violation regarding a conflict of interest is identical to the standard applied in the Pennsylvania courts. Commonwealth ex rel. Whitling v. Russell, 406 Pa. 45, 170 A.2d 641 (1962); Commonwealth v. Werner, 217 Pa. Super. 49, 268 A.2d 195 (1970).

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

Marilyn J. Gelb
Counsel for Respondent
1314 Chestnut Street - 15 Fl.
Philadelphia, PA 19107